

Intellectual Property

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What was the most interesting development of 2023, and why?

Reluctance to pursue summary adjudication in complex disputes.

In 2020 and 2021, several decisions from the Federal Court signaled a willingness to consider increased use of summary adjudication (summary judgment/summary trials) for complex IP disputes, such as patent infringement actions. This eagerness was significant because the Federal Court of Appeal had been historically reluctant to uphold summary

adjudication for these types of cases because of their complexity. Building on this momentum, 2022 saw (i) the Federal Court of Appeal weigh in on those decisions, confirming that they would uphold a summary adjudication in the right circumstances, and (ii) the [Chief Justice of the Federal Court](#) issuing a rallying cry to the IP Bar to consider summary adjudication. Despite the expectation that an uptick in summary adjudication would permeate last year's docket, 2023 was a relatively quiet year, perhaps because of uncertainty around what constitutes the right circumstances for a summary trial or summary judgment motion. Our [past comments](#) in this area offer more practical guidance on what the right circumstances might be.

As [the Court acknowledged](#), when used correctly, summary adjudication presents tangible benefits (e.g., had the parties pursued summary adjudication “a considerable amount of judicial resources would have been saved, and each party's legal costs would have been substantially reduced”). Parties with a clear litigation strategy from the outset, and who are prepared to put their best foot forward with respect to the evidence regardless of the procedure, are well-positioned to realize these benefits.

What's the primary takeaway for businesses from the past year?

Today's economy continues to be driven by technology and innovation. For successful businesses, some form of intellectual property is invariably their most valuable asset (e.g., key brands, patents, and proprietary know-how). In 2023, we increasingly saw companies leveraging their intellectual property in litigation to protect competitive advantage and prevent unfair competition.

For example, the number of infringement actions commenced in the Federal Court in 2023 was 219, up from 192 in 2022. This trend was particularly important during 2023's near recession, and will continue to be important going forward so long as recessionary conditions remain in economic forecasts. The bottom line is that when competition gets tough, companies rely on their IP to weather the storm and emerge stronger. We saw that in 2023 and expect the trend to continue in 2024.

What's one trend you are expecting in 2024?

In 2024, we are expecting increased litigation related to the life sciences, technology, and energy sectors. During the pandemic, entities in these sectors were inclined to effectively put litigation on the back burner to focus on bringing new innovations to address pandemic needs (e.g., vaccines, shields, workplace safety and enhancement technology), their employees' well-being, and new operational challenges (e.g., reestablishing supply chains, building infrastructure, scaling up workforces and transitioning to remote work). With many of these operational challenges subsiding and pharmaceutical litigation picking up industry-wide, we anticipate 2024 will see companies fully engaged with the litigation process. In addition to pharmaceutical patent litigation, we are also expecting to see an increase in litigation relating to the enforcement of AI-related IP, and to copyright disputes in the context of generative AI. The intersection of AI and IP will continue to be on trend for 2024 across all industries.



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